SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1009

J. C. CROCKETT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

No. 1010

J. C. CROCKETT,

Petitioner,

vs.

GEORGE H. McELROY AND PETER A. HANNA.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

A statement of facts sufficient for the determination of this case appears in the petition for writs of certiorari and will not be repeated here.

Propositions Relied On to Reverse Judgment of Lower Court.

A.

The evidence is not sufficient to justify the jury in finding that at the time of the accident Ellison was operating petitioner's car as the agent for and on the business of petitioner.

B.

The evidence is not sufficient to justify the jury in finding that at the time of the accident Ellison was operating petitioner's car with the knowledge and consent of Herbert Holt.

C.

The evidence is not sufficient to justify the jury in finding that Holt was a person of inebrious habits; that petitioner knew of said habits, and that petitioner was, therefore negligent in allowing Holt to drive petitioner's car.

D.

The Circuit Court of Appeals erred in deciding these cases upon issues not raised in the pleadings, not submitted to the jury, nor considered by the District Court, and upon which issues no evidence whatever was introduced by any of the parties hereto.

ARGUMENT.

A.

The evidence is not sufficient to justify the jury in finding that at the time of the accident Ellison was operating petitioner's car as the agent for and on the business of petitioner.

We submit that it is entirely clear from the evidence that at the time of the accident Frank Ellison was not

operating petitioner's car as the agent for and on the business of petitioner, but that the car was being operated solely for the pleasure and convenience of the occupants thereof, and not for any purpose connected with petitioner's business.

What was the object and purpose of the trip on which this accident occurred? The sole object and purpose of the trip was to go to Gooch Harris' beer joint and secure a cabin and throw a party. This information was given to Pansy Burnett and Vergie Hunter by Weikel, Ellison and Vergie Keatly about 3:30 or 4 o'clock p. m., on the day of the accident (R. 113, 115). There is no evidence to the contrary. At this time, Weikel, Ellison and Vergie Keatly were drunk and Holt was passed out in the rear seat, and had been passed out since about 1 p. m., when the party left the DeLuxe Sandwich Shop (R. 110). How is it possible for anyone to contend that this trip was undertaken in the interest of petitioner, or that Ellison was acting as the agent for petitioner on this trip? What possible interest did petitioner have in this escapade? The car was not being demonstrated to Ellison, Weikel or Vergie Keatly, and none of them were prospects for the sale of this car. In fact, neither Ellison nor Keatly were prospects for the sale of any car. Weikel seemed to be a prospect for a new car at a later date. However, the last time this subject was discussed between Holt and Weikel was on the Athens Road about 11 o'clock a. m., and at least five hours before the accident (R. 80 and 89). However, by talking sale to Weikel about 11 a. m., during a drinking party, Holt could not turn the whole day's activities into acts in the furtherance of petitioner's business.

The witness Vergie Keatly was examined as a witness for McElroy, and testified that just before the party left the DeLuxe Sandwich Shop (about 1 o'clock, R. 110), that Ellison asked one of the girls there to allow her

little boy to go along and that Ellison said, "O, hell, let him go, we won't be long, we are just trying the car out, demonstrating" (R. 42). Petitioner objected to this answer, and the court ruled that it could have no effect whatever on petitioner, and was not admissible to prove the fact of agency (R. 145-146). However, this statement was denied by Ellison (R. 79 and 83), and was likewise denied by Ann Blevins (R. 108-107), and is plainly contradicted by the admitted facts and circumstances. If there is one thing clearly and conclusively proved in this case, it is that this Plymouth car was not being demonstrated and had not been demonstrated to anyone on that day and that no effort whatever had been made by Holt to sell this car to anyone.

The sole object and purpose of this journey, lasting from 9 a. m., until 4 p. m., was to drink liquor and to joy ride. We quote from the evidence of Frank Ellison (R. 80 and 81):

> "Q. 84. Now, Mr. Ellison, what was the purpose of all this riding that you men were doing from nine o'clock in the morning until about two-thirty that afternoon? What was your purpose in it?
>
> "A. Well, we were just out to drink, that was all, just drinking, didn't have any particular purpose."

Also see evidence of Herbert Holt (R. 121):

> "Q. 64. Now, during this trip that you took with Ellison and Weikel, during that day from nine o'clock in the morning until the time this accident occurred, just what was your purpose in riding around with these men?
>
> A. To drink whiskey.
>
> Q. 65. Was that the sole purpose?
>
> A. That was all."

Also see evidence of Robert Weikel (R. 92):

> "Q. 52. Where were you headed when this accident happened, where were you going?

A. Really, I don't know where.
Q. 53. If you were sober, why didn't you know?
A. I didn't ask any questions. I was just riding.
Q. 54. Just joy-riding?
A. Yes, sir."

Ellison and Weikel testified as witnesses for McElroy and the United States of America, and Hanna later adopted this testimony (R. 144). No one testified to the contrary. Plaintiffs are bound by this testimony. In fact there is nothing in the record to contradict it. All other facts and circumstances corroborate it.

There is no evidence in the entire record showing or tending to show that at the time of the accident Ellison was operating this car as the agent for petitioner or on petitioner's business. What business, we ask? How were petitioner's interests being advanced by this trip? What possible benefit was petitioner expected to derive from the trip? The questions answer themselves. We may certainly assume one thing, and that is this—if petitioner had known the use to which this car was being put, that it was being operated not by a prospective purchaser, but by a drunken driver, whose operator's license had been revoked on account of drunken driving, he would not have approved of it, and it would never have occurred to him that this thing was being done for his benefit, and in the furtherance of his business.

We submit that the *primary purpose* of the entire trip from nine a. m. to four p. m. was to joy-ride and drink liquor. The sales talk between Holt and Weikel at nine a. m. and 11 a. m. was *incidental* to the main purpose of the joy-riding and drinking liquor, and, therefore, we do not believe it can be said that Holt was on the business of petitioner at any time after he met Ellison and Weikel and the drinking began. From that time on, the joy-riding, the

women and the liquor were uppermost in Holt's mind, his master's business was forgotten.

However, assuming that when Holt talked sales to Weikel at nine a. m. and eleven a. m. he was acting on the business of petitioner, and that petitioner would have been liable for Holt's acts committed at these times, certainly after eleven a. m. Holt abandoned petitioner's business entirely and completely and thereafter it cannot be said that Holt was acting as the agent for petitioner and within the scope of his employment.

The authorities agree that petitioner's liability depends upon whether Ellison was his servant or agent and engaged upon his business *at the time the negligent act occurred.*

The trip from Princeton to the Athens Road about 10:30 or 11 o'clock was not taken for the purpose of discussing the sale of the car, this trip was undertaken at the request of Ellison and Weikel to permit them to drink liquor (R. 119).

The trip from the DeLuxe Sandwich Shop to Gooch Harris' beer joint was certainly not taken for any purpose connected with petitioner's business. The sole purpose of this trip was to enable Weikel, Ellison and Vergie Keatly to secure a cabin and have a drinking party. Holt was not consulted in regard to this trip, and he knew nothing whatever about it.

In their brief filed in the Circuit Court of Appeals the plaintiff made much of the fact that Holt, Weikel and Ellison became intoxicated, the brief going on to say that "many business transactions are closed with the aid of whiskey. Conviviality and cordiality are prime requisites of salesmanship."

We merely wish to point out that all of the liquor consumed by Holt, Ellison and Weikel on the day of the accident was furnished and paid for by Weikel. Therefore, we

do not have a case of the salesman using liquor to sell a car to a prospect; here the prospect was entertaining the salesman.

(1) Authorities Relied on by Petitioner on Question of Whether Ellison Was Operating the Car as Agent for and on Business of Petitioner.

We will first discuss the West Virginia cases bearing on this question.

We call the court's particular attention to the case of *Meyn* v. *Dulaney-Miller Auto Company,* 118 W. Va. 545, 191 S. E. 558, decided by the Supreme Court of Appeals of West Virginia, on June 23, 1937. This was an action of trespass on the case instituted by Meyn against Dulaney-Miller Auto Company, a Corporation, and Bart Scanlon, to recover damages for personal injury growing out of an automobile accident. The plaintiff was struck and injured by an automobile driven by the defendant, Scanlon, and owned by defendant, Dulaney-Miller Auto Company. The facts as stated in the court's opinion are as follows:

> "The Dulaney Company was engaged in the business of selling automobiles, new and used; Scanlon was in charge of, and also a salesman in, the company's used car department. He was paid a salary of $100.00 per month to operate the department, with commissions of 2 per cent on sales made by him personally and 1 per cent on sales made by salesmen under him. He could sell used cars, including the car in which he was riding at the time of the accident, at all times of the day or night, although his regular hours of employment were between 8 a. m. and 9 p. m. The used car department, according to custom, closed at 9 p. m. This department was located at the defendant company's regular place of business at Twenty-third and Market Streets, a number of blocks directly south of the place of the accident. *Scanlon had the right to use the car in question in going to, and returning from, his work. He also had*

the right to use it and other used cars for his company's business and his own pleasure. However, he was expected to purchase his own gasoline when he used such cars for pleasure. At the time of the accident, Scanlon lived in the 'Out the Pike' section of Wheeling, a residential section some distance from the defendant company's location, the place of accident being on the route between the company's place of business and Scanlon's home.

On the night in question, Scanlon used the car to attend a Shriners' picnic at Wheeling Park. From Wheeling Park he took two young women, whom he met there, to their homes in Martin's Ferry, and then returned to the Washington Restaurant in Wheeling, which restaurant is situated on Market Street a short distance south of the place of accident. He left the restaurant about 11:30 p. m. and drove south on Market Street in a direction opposite from his home to the street in front of the Dulaney Company's place of business for the purpose of assuring himself that the used cars belonging to the company had been removed from the street to their proper place for storage for the night. While there, he did not leave the car, but satisfied himself by a view from the driver's seat. After he had assured himself, he drove north on Market Street toward his home, and incidentally, to the place of accident."

The court held that at the time of the accident in question that Scanlon was acting within the scope of his employment, and that the Dulaney-Miller Auto Company was liable to the plaintiff. However, in the course of its opinion, the court said:

"We need not restate in detail the circumstances bearing upon Scanlon's relation to the company's business. The jury having decided that, at the time of the accident, Scanlon was acting within the scope of his employment, we are now concerned with the law of the case. Ordinarily, the owner of an automobile is not liable for injuries caused by a servant, while operating the car on his own business or pleasure, though the servant had the owner's consent. *This was Scanlon's*

exact situation when he went to the Shriner's picnic at Wheeling Park, and then took the young women home. The fact that he had a right to sell the automobile at the picnic, and while there was incidentally advertising the company's business, did not bring him within the scope of his employment. He was on a 'frolic of his own'."

We call the court's particular attention to this case. It will be observed in the case that Scanlon had the right to use the car in question in going to and returning from his work, and the right to use it and other used cars for his company's business and his own pleasure, and was paid a salary. Yet, the court held that in attending the Shriners' picnic at Wheeling Park, and later taking the young women home, that Scanlon was on a "frolic of his own", although while at the picnic he was incidentally advertising the company's business and had a right to sell the car had he found a purchaser.

In the principal case, Herbert Holt had no regular working hours, was not paid a salary, did not have the right to use petitioner's car for his own pleasure or convenience, and did not have a right to drive it to and from his home. His authority was considerably more restricted than Scanlon's authority, and at the time the accident occurred, Holt was acting in disobedience of petitioner's orders.

We also call the court's attention to the case of *Ritter* v. *Hicks*, 102 W. Va. 541, 135 S. E. 601. This was an action by Alice Ritter, administratrix of the estate of James E. Ritter, against H. W. Hicks, the owner of a car, and I. R. Hicks, the operator thereof, for the death of plaintiff's decedent, which occurred when said automobile struck and killed plaintiff's decedent. The facts in this case were as follows:

About 8 p. m., of December 23, 1924, Mr. Ritter was struck by an automobile on a street in the city of Bluefield. These injuries caused his death. The automobile was being driven

by I. R. Hicks, who was the son of H. W. Hicks. H. W. Hicks lived at Pocahontas, Virginia, where he dealt in automobiles. He was also the sole proprietor of an automobile agency at Keystone, W. Va. I. R. Hicks was the manager and in full control of the Keystone business. *It was his habit to use the cars under his charge for his own pleasure and convenience. This practice was known to and seemingly approved by his father.*

On the night of the accident, I. R. Hicks was driving for his own pleasure a heavy Lincoln sedan kept at the Keystone agency for demonstration and sale. The jury returned a verdict against both H. W. and I. R. Hicks, and both appealed. In reversing the judgment against H. W. Hicks, the Supreme Court of Appeals of West Virginia held that he was not liable for the act of I. R. Hicks, either under the family purpose doctrine or under the doctrine of respondeat superior. The court said:

> "The authorities are in accordance that the owner of a car is not responsible in a case where his agent or employee uses the car when off duty, for his own pleasure, and not in the business of his employer."

It will be observed that in the case just referred to, I. R. Hicks was the manager of the Keystone agency, and had the right to use the cars of H. W. Hicks on the business of the company, *or for his own pleasure and convenience. Apparently his right to use the cars was in no way restricted.* Yet the court held that he was not acting within the scope of his employment at the time he struck and killed Ritter. The principal case is much stronger from the petitioner's standpoint. In the principal case, Holt was employed on a purely commission basis. He worked when he pleased. He did not have the right to use petitioner's cars for his own pleasure or convenience. His use of the car was limited strictly to demonstration purposes.

We also call the court's attention to the case of *Jenkins* v. *Spitler,* 120 W. Va. 514, 199 S. E. 368. In this case, Helen M. Jenkins brought suit against E. Paul Spitler, Otis Perry, and Herbert M. Campbell and Howard B. Campbell, trading and doing business as Campbell Brothers, to recover damages for personal injuries caused by a collision between the automobile in which she was riding and the automobile owned by the defendants, Campbell Brothers, driven by defendant Otis Perry, in which the other defendant, Spitler, was riding. Spitler did not appeal. Judgment was entered on a jury verdict against the two Campbells, trading and doing business as aforesaid, and Otis Perry. Campbell Brothers prosecute error. The facts were as follows:

The Campbells were partners engaged in the automobile business in Nicholas County. Spitler, manager of one of their garages, with general authority to sell their cars, was loaned a used car to visit his sick wife at Staunton, Virginia. H. M. Campbell, at Spitler's request, gave the latter a specific sales price on the car, if, while on the trip, he should happen to get a chance to sell it; and H. B. Campbell, the other partner, helped Spitler fasten on the car dealer's license plates and also handed to him a small package to be delivered several miles beyond Staunton. Spitler drove the car to Richwood, West Virginia, where he induced Perry to join him on the trip. Perry drove to a point on the Midland Trail about 60 miles away where the loaned car collided with a car occupied by plaintiff and her husband, and the plaintiff was injured.

In this case, the Supreme Court of Appeals of West Virginia held that Campbell Brothers were not liable for the negligent operation of the car, and the court cited with approval the case of *Meyn* v. *Dulaney-Miller Auto Company,* 118 W. Va. 545, 191 S. E. 558, heretofore referred to.

Syllabus 1 of the case of *Jenkins* v. *Spitler, supra,* reads as follows:

> "The owner of an automobile is not liable for injuries caused by the negligence of his employee, while permissively operating the car on his own business or pleasure, though he had the right to sell the car, while so driving it, and was incidentally charged with a mission for his employer's benefit."

In the case of *Coates* v. *Auto Sales Company,* 106 W. Va. 380, 145 S. E. 644, the plaintiff sued Auto Sales Company to recover for personal injuries received by plaintiff when struck by an automobile owned by Auto Sales Company, and operated by William Mitchem, an employee of Auto Sales Company. The facts of the case are as follows:

Prior to July 1st, 1925, the Auto Sales Company owned and operated in the City of Wheeling an automobile business which, on that date, it sold and delivered to William Nolan and Gordon Roberts. William Mitchem, nineteen years of age, had been staying around the place of business for five or six weeks, intermittently performing service for the defendant for which he received such compensation as it saw fit to allow him. He slept in the building used in the conduct of the business. While the merchandise embraced in the sale was being inventoried on the day of its delivery, Mitchem assisted in the loading of a truck of the defendant with certain materials which had not been sold. Late in the afternoon when the purchasers had assumed charge of the business, W. L. Smith, president of defendant, requested Mitchem to drive the truck to another place of business of the defendant in Wheeling the following morning. The loading of the truck was completed in the evening by Mitchem and Corbett Howell, who had been serving the defendant as a night employee at the plant. H. D. Evans, who had been the local manager of the business for the de-

fendant, returned in the evening to do some clerical work for it and to place its books of account in the loaded truck. About 11 o'clock in the night Mitchem took him to his home, nearby, in an automobile of the defendant. Later, upon his own initiative and with the knowledge of Corbett Howell, Mitchem drove the car to his father's home, several miles distant, for the purpose, as he claims, of returning a small batch of tools belonging to him and which he had been using in the service of the defendant. Enroute on his return he seriously injured the plaintiff by the negligent operation of the car.

The court held that the Auto Sales Company was not responsible for Mitchem's conduct in injuring plaintiff because Mitchem was *off duty* at the time of the accident. In the course of its opinion, the court said:

> "The master is not liable for the act of the servant resulting in injury to another, if committed at a time when the servant is off duty * * * There can be no question of the fact that the duties of Michem for the day had ended before he started on the trip for the purpose, as he says, of carrying his tools home. The practice testified to by him of using the cars of the defendant without its express authorization does not render it liable for his negligence of which the plaintiff complains. * * *"
>
> There is no merit in the position of the plaintiff that Mitchem was in the service of the defendant while making the trip, because of the obligation of the Auto Sales Company to return the tools. Mitchem was not at the time carrying out any instructions of the defendant, and admits that he could have taken the tools the next morning on the truck to its place of business and thence on the street car to his home."

We also call attention to the case of *Don Shrimplin* v. *Simmons Auto Company* (W. Va.), 9 S. E. (2) 49. This case is not in point on the facts, but in line with later *West Virginia* cases, indicates a definite trend to limit the liability

of an automobile dealer for acts of a salesman operating the dealer's car, and the reasoning of the court is applicable to the principal case.

In the *Shrimplin* case above referred to, plaintiff sued the defendant, an automobile dealer, for personal injuries received by plaintiff while riding as a guest in an automobile owned by defendant and driven by one Chenoweth, defendant's salesman. The car operated by Chenoweth collided with another car at an intersection, and plaintiff sued defendant for his resulting injuries. In this case Chenoweth received compensation at $12.00 per week, and 3% commission on sales. He was permitted to use cars owned by defendant, and had "broad authority" with respect to hunting up sales prospects and negotiating sales to persons already contacted by defendant. On the morning of the accident, Chenoweth left Spencer, W. Va., for the purpose of seeing a prospect near Arnoldsburg, which was 15 miles from Spencer. When Chenoweth reached Arnoldsburg, he decided not to see this prospect, but that he would see another prospect. Later Chenoweth reached plaintiff's lumber camp and attempted to sell or trade plaintiff the car operated by Chenoweth. Chenoweth then suggested that plaintiff ride to Spencer with him so that they might discuss the trade. Plaintiff accepted. On the trip back to Spencer, the trade was discussed, but not consummated. It was not thereafter discussed. After lunch, Chenoweth, accompanied by plaintiff, called on a Miss Price, another prospect, and she was taken into the car, and the three went on a trip lasting several hours, during which trip Miss Price drove the car. The accident occurred on this trip. In holding that the plaintiff was not entitled to recover from defendant, the court said:

> "Clearly, in demonstrating and attempting to sell this car to Miss Price, Chenoweth was not then engaged

in any effort to trade the same car to the plaintiff, and there would seem to be no basis upon which it can reasonably be contended that in carrying the plaintiff over a route entirely different from that to which his earlier invitation referred the liability of the defendant for the exercise of due care still continued. True, Chenoweth was continuously in the employ of the defendant, but he was not exercising that employment during the afternoon in any effort to make a sale to or trade with the plaintiff. *We think there must be some limitation upon the authority of a servant, even while within the scope of his employment, in inviting people to ride in an automobile under his control,* when such invitation has no connection with the business in which he is then engaged. *An invitation, proper at the time made, cannot be held to continue long after the consummation of the purpose which prompted it.* Any new invitation must rest upon the circumstances then existing. We are of opinion that when the plaintiff accompanied Chenoweth during the afternoon of May 26, when he was engaged in business of his company with which plaintiff was in no way associated, he no longer had the protection contemplated by the original invitation, that of the obligation to exercise due care; and further that the defendant could only be held liable where there was a showing of reckless, wanton, wilful negligence. There is no such showing on this record, nor any contention that there was that character of negligence, and we, therefore, *hold that the trial court was warranted in striking out the plaintiff's evidence and directing a verdict for the defendant upon the ground that, on this record, no liability rested upon the defendant for the conduct of Chenoweth, even though there may have been a lack of care on his part.*"

In the case just referred to, plaintiff was not permitted to recover because at the time of the accident, plaintiff's permission to ride in defendant's car had no connection with defendant's business, and the interests of defendant were not being promoted in any way by plaintiff's presence in the

car. And this was true, even though Chenoweth was acting within the scope of his employment at the time of the accident in demonstrating the car to Miss Price, and that a few hours previously the car had been demonstrated to plaintiff.

The most recent case decided by the Supreme Court of Appeals of West Virginia, which bears on the question under consideration is the case of *George H. Lacewell, Admr.* v. *J. G. Lampkin, et al.* This case was decided on March 3, 1941, and is not yet reported. The facts are as follows:

On the morning of June 1st, 1939, between 8:30 and 9 o'clock, plaintiff's decedent, a young lady who taught in the public schools at Grant Town, a distance of approximately ten miles from Fairmont, was waiting at 26 Pennsylvania Avenue at Fairmont to be driven to Grant Town where her pupils were to assemble for a picnic commencing at 10 o'clock. Her expected means of transportation failed to materialize and she hailed Loenza Nunn, a friend, who was passing in a Packard sedan, and whom she had known for several years, and asked him to drive her to Grant Town. Nunn was an embalming apprentice in the undertaking establishment of defendant Lampkin, receiving no regular compensation and being given two or three dollars a week for spending money. He speaks of his employment as working as an assistant and states that he drove automobiles for Lampkin "in funerals and other business". Lampkin says that part of his duties were to keep the passenger cars of which there were four, clean and supplied with gasoline.

Nunn advised plaintiff's decedent that he would be obliged to go to the undertaking establishment and get the permission of Lampkin, he then being engaged in having the tank of the car he was driving filled with gasoline pursuant to Lampkin's definite instructions. Upon reaching the place of business, Nunn was told by Lampkin that it would be

"all right" to take the two teachers to Grant Town, but he, Lampkin, desired to use the car Nunn had been driving, so that the Grant Town trip should be made in a seven passenger Packard sedan also owned by Lampkin. Nunn took the large Packard and went at once to fulfill his promise. Nunn's passengers purchased two gallons of gasoline, the estimated amount to fuel the Packard to Grant Town and return, and proceeded on the way to Grant Town. On the trip to Grant Town, he was involved in a collision, and plaintiff's decedent was killed. An action was then brought against Lampkin, the owner of the car, to recover for the death of plaintiff's decedent. The Supreme Court of Appeals of West Virginia held that Lampkin, the owner of the car, was not liable on the doctrine of respondeat superior. The court said that although Nunn was generally employed as the servant of Lampkin, that he was not acting within the scope of his employment in driving plaintiff's decedent to Grant Town, and hence that Lampkin was not responsible for Nunn's negligent act causing the death of plaintiff's decedent.

There are a number of cases from other jurisdictions very similar upon the facts to the case under consideration, which we will refer to briefly.

Syllabus 1:

> "Whether employer was liable for injuries caused by negligent driving of demonstration car by employee selling cars on commission depended on whether negligent act of employee was within scope of employment."

Syllabus 2:

> "Act of servant, to fall within scope of employment, must be in prosecution of master's business or incident to duties of servant, or connected therewith, or necessary to accomplish purpose of employment."

Syllabus 3:

"Negligent act of automobile salesman, paid on commission basis, in driving demonstration car while intoxicated, causing injuries, held not within scope of employment, where salesman was making Sunday morning trip on private mission, with no purpose of soliciting business for employer."

Grier v. *Grier, et al.* (N. C.), 135 S. E. 852.

Syllabus 1:

"Evidence held not to show that automobile salesman was acting within 'scope of employment' when he struck pedestrian while driving company automobile late at night at end of drinking party after leaving saloon where he had incidentally interviewed bartender about buying car."

Price v. *Shorewood Motors, Inc.* (Wis.), 251 N. W. 244.

Syllabus 2:

"An employer was not liable under doctrine of respondeat superior for death resulting from collision between automobile in which deceased was riding and automobile of employer in custody of its agent which was being negligently driven by a friend of agent at agent's request after they had spent the night in search of entertainment for purposes purely personal to themselves."

Syllabus 3:

"Even if agent had authority to use employer's automobile on frolics of his own, agent's status would be that of an ordinary bailee for whose negligence the employer would not be liable."

Syllabus 4:

"An employer was not liable under doctrine of respondeat superior for death sustained in collision between automobile in which deceased was riding and

automobile which was driv*ing* by a friend of employer's agent at agent's request while agent slept or lay in a drunken stupor therein after a night spent in search of entertainment, on theory that agent was going to a certain town to have damaged fender repaired, where to do so would require that such trip be entirely isolated from the activities of agent and his friend during the entire night."

McNeal, et al. v. *Home Ins. Co., et al.* (Texas), 112 S. W. (2) 339.

Syllabus 5:

"Where an automobile salesman, driving a car which his employers furnished him for his use in making sales, demonstrated the car to a prospective customer, and after leaving the customer's home took the customer's friends to their home in a neighboring city, where a pedestrian was run down by car after the salesman turned to place to buy cigarettes, he was not then engaged in the work of his employer, but in the pursuit of his own affairs."

Moore v. *P. J. Downs Co., et al.* (Minn.), 185 N. W. 395.

Syllabus 3:

"That driver of dealer's automobile at time of collision was one of dealer's salesmen, who had authority to use automobile while in his possession in furtherance of dealer's business, held not to render dealer liable for salesman's negligence, where at time of accident salesman was using automobile for his personal pleasure."

D. S. Etheridge Co. v. *Peterson* (Tenn.), 90 S. W. (2) 957.

Syllabus 3:

"Operation of automobile by salesman on his way to his residence for purpose of bringing his wife into the city, though within period of working hours, held as matter of law not within scope of salesman's employ-

ment by motor car company, so as to render company liable for injuries alleged to have resulted from salesman's negligent driving."

McCormack Bros. Motor Car Co. v. *Holland*, 118 So. 387.

Syllabus 2:

"One seeking recovery against an automobile owner for injury caused by negligence of the chauffeur must not only establish the relationship of master and servant between the owner and the chauffeur, but, further, that the chauffeur at the time of the accident was about his master's business, and was acting within the scope of his employment."

Syllabus 3:

"Where a chauffeur, under order of his master to transport another servant to a certain place on a visit and bring her back, reached the place at 3 o'clock and called for her at 5 o'clock, the master was not liable for injuries caused by negligence of the chauffeur in the interim, while he was joy-riding with a friend, and was neither going for nor returning with his passenger."

Kidd v. *DeWitt* (Va.), 105 S. E. 124.

Syllabus 2:

"Employer held not liable for negligence of its truck driver who deviated abruptly from direct return route to factory and caused damage for which recovery was sought twenty blocks distant from his route while on an errand of his own, since relationship of master and servant was suspended while truck driver was engaged in his own business."

Virginia Ice & Freezing Corporation v. *Coffin* (Va.), 184 S. E. 214.

Syllabus 1:

"Where servant is doing his own work or that of third person, master is not liable for his negligence."

Syllabus 2:

"Master held not liable for servant's negligence while on personal errand, though driving automobile furnished by master.

"The employee was a mine superintendent, and the automobile was furnished primarily to enable him to travel between the different mines in the performance of his duty, but no restrictions were placed upon its use. At the time of the accident, he was driving to a distant city to visit his family."

Elkhorn Piney Coal Mining Co. v. *Hazelett* (C. C. A., 6th Cir.), 62 F. (2d) 137.

Syllabus 3:

"Where collector, receiving mileage allowance for operating own automobile between towns on itinerary, customarily with employer's knowledge returned to home for week-ends without receiving mileage allowance therefor, employer held not liable for collector's alleged negligent operation of automobile while returning from town in which he had finished employer's business to home for week-end."

Syllabus 4:

"To establish liability under respondeat superior doctrine, it must be shown that plaintiff was injured by alleged wrongdoer's negligence, that relation of master and servant existed between one sought to be charged and alleged wrongdoer, that neglect of servant was in course of employment or in scope of authority, and that servant was engaged in master's work and was about master's business at time of injury."

P. F. Collier & Son Distributing Corp. v. *Drinkwater* (C. C. A., 4th Cir.), 81 F. (2d) 200.

Also see *Denton* v. *Yazoo & M. V. R. Co., et al.*, 284 U. S. 305, 308, 52 S. Ct. 141, 76 L. Ed. 310; *The Standard Oil Company* v. *Anderson*, 212 U. S. 215, 221, 29 S. Ct. 252, 254, 53 L. Ed. 480.

(2) Authorities Relied on by Plaintiffs on Question of Whether Ellison was Operating the Car as Agent for and on Behalf of Petitioner.

At the trial in the lower court appellees apparently relied mainly on the following West Virginia cases: *Cochran* v. *Michaels*, 110 W. Va. 127, 157 S. E. 173; *Shahan* v. *Jones*, 115 W. Va. 749, 177 S. E. 774; *Miller* v. *Douglas*, (W. Va.) 5 S. E. (2) 799. We believe we are justified in saying that the case of *Cochran* v. *Michaels, supra*, is principally relied on by appellees, and for that reason, we shall discuss it fully.

In this case, plaintiff was injured by an automobile owned by defendant and driven by a salesman employed by defendant for the purpose of selling used cars. The driver was employed to sell used cars at the price and on the terms fixed by defendant, who was in the garage business at Fairmont. The driver was authorized by defendant to go anywhere within reason, on his own initiative in search of a purchaser, subject to the order that he should return the car to the garage by 8 p. m. He was privileged to "pick up" his friends on his trips. At the time of the accident, the driver was taking a friend with three other persons to Fairmont to consult a doctor. The friend lived at Everson, which is about 7 miles from Fairmont. None of the passengers were prospects for a sale. Under the circumstances, the defendant contended that the relationship of master and servant between him and the driver did not exist at the time of the accident, and that consequently he was not liable for plaintiff's injuries. However, the court held that at the time of the accident that the driver was acting within the scope of his employment and that the defendant was liable for his negligent act in injuring plaintiff. In the course of its opinion the court said:

> "It is apparent that at the time of the accident the driver was not engaged directly in defendant's busi-

ness, in a narrow and restricted sense; but, as we have seen from Mechem, the rule of respondeat superior is not limited to such a restriction. * * * It may be conceded that the driver did not even intend to further the master's business by the course he was pursuing at that time; but his mental attitude, alone, is not controlling. * * * The real test is 'in the relation which the act done bears to the employment'. * * * Much of the driver's information as to prospective purchasers necessarily came through his friends and acquaintances. One purpose of his 'roving commission' was evidently to allow him to visit at will among his friends and acquaintances, in search of this information. *It is reasonable that the defendant had this in mind in giving the driver permission to pick up friends.* A friend picked up became an eager informant as well as a partisan of the driver, and the interest of the defendant was thus promoted. Authority to pick up friends impliedly included permission for the driver to put aside momentarily the direct search for purchasers in order to serve the friends. It is a common trait of servants to usurp authority in the absence of the master. Knowledge of this trait is chargeable to the defendant, as an employer of labor. Mere abuse of authority by the servant, does not sever the relation of master and servant. * * * It is not necessary that the defendant should have anticipated the exact circumstances surrounding this accident. It is sufficient if it was probable that the driver would at times exceed his express authority and carry a friend (a greater or less distance) solely as an accommodation to the friend. * * * *We are of opinion that such an act of accommodation was a natural consequence of the broad powers conferred on the driver, and that the defendant should have anticipated that at some time some place the driver would do just that thing. If so, the act which occasioned the plaintiff's injury was within the scope of the driver's employment, and the defendant is responsible for that act.* As there was no conflict in the evidence on this subject, it was a question of law for the trial court, and should not have been submitted to

> the jury as was done by several instructions given on behalf of defendant. This was error and warranted the court in setting aside the verdict."

There are three very good reasons why the case just referred to is not controlling. First, it is not in point on the facts; second, it has been impliedly overruled by later West Virginia cases; third, it is wrong on principle. We shall discuss these propositions in order:

COCHRAN V. MICHAELS IS NOT IN POINT ON THE FACTS.

In *Cochran* v. *Michaels,* the salesman had authority without permission to go anywhere within reason on his own initiative in search of a purchaser, subject to the order that he should return the car to the garage by 8 p. m. The salesman was authorized to "pick up" his friends on these trips. He had a "roving commission". The court said that "authority to pick up friends included permission for the driver to put aside momentarily the direct search for purchasers in order to serve his friends." Certainly Herbert Holt had no such authority. Holt, testifying as a witness for McElroy and the United States, which evidence was later adopted by Hanna, testified that he always obtained petitioner's permission before using his cars; that he had authority to use them only for business purposes and no right to use them for his own personal pleasures and convenience; that he did not even drive the cars to and from his home; that he had the right to permit prospective purchasers to drive the cars, but that he did not have authority to allow other persons to drive them. At the time this accident occurred, Holt was supposed to be at Hiawatha demonstrating this car to a prospective purchaser, and when he fell in with Ellison and Weikel and went off on a drunken spree, he was acting in *disobedience* of express orders of petitioner. Therefore, it will be seen that the broad powers

conferred on the salesman in the case of *Cochran* v. *Michaels, supra,* was the sole basis for the decision in that case. The court, in that case, said:

> "We are of opinion that such an act of accommodation was a natural consequence of the broad powers conferred on the driver, and that the defendant should have anticipated that at some time some place the driver would do just that thing."

Holt as petitioner's salesman possessed no such authority, and this fact alone clearly distinguishes the principal case from the case of *Cochran* v. *Michaels.*

COCHRAN V. MICHAELS HAS BEEN IMPLIEDLY OVERRULED BY LATER WEST VIRGINIA CASES.

We submit that the case of *Cochran* v. *Michaels* has been impliedly overruled by at least two later West Virginia cases; namely, *Meyn* v. *Dulaney-Miller Auto Company,* 118 W. Va. 545, 191 S. E. 558, and *Jenkins* v. *Spitler,* 120 W. Va. 514, 199 S. E. 368. In the case of *Meyn* v. *Dulaney-Miller Auto Company, supra,* the employee, who was manager of defendant's used car department, had authority to use the car in question in going to and returning from his work, and the right to use it and other used cars for the company's business and his own pleasure. However, the court said in that case:

> "We need not restate in detail the circumstances bearing upon Scanlon's relation to the company's business. The jury having decided that, at the time of the accident, Scanlon was acting within the scope of his employment, we are not concerned with the law of the case. Ordinarily, the owner of an automobile is not liable for injuries caused by a servant, while operating the car on his own business or pleasure, though the servant had the owner's consent. *This was Scanlon's exact situation when he went to the Shriner's*

> *picnic at Wheeling Park, and then took the young woman home. The fact that he had a right to sell the automobile at the picnic, and while there was incidentally advertising the company's business, did not bring him within the scope of his employment.* He was on a 'frolic of his own'."

Does not this statement indicate clearly that the West Virginia court has forsaken the rule laid down in *Cochran* v. *Michaels?* We also call attention to the case of *Jenkins* v. *Spitler,* 120 W. Va. 514, 199 S. E. 368, Syl. 1 of which reads as follows:

> "The owner of an automobile is not liable for injuries caused by the negligence of his employee, while permissively operating the car on his own business or pleasure, though he had the right to sell the car, while so driving it, and was incidentally charged with a mission for his employer's benefit."

In the principal case, petitioner authorized Holt to drive the car to Hiawatha, but Holt disobeyed instructions and went on a frolic of his own.

Cochran v. Michaels is Wrong on Principle.

According to the cases heretofore cited and the overwhelming weight of authority, *Cochran* v. *Michaels* is wrong on principle, which probably accounts for the fact that the West Virginia court has practically ignored it in subsequent decisions.

Appellees also rely upon the case of *Shahan* v. *Jones,* 115 W. Va. 749, 177 S. E. 774. In this case, plaintiff, an infant, recovered a judgment against defendant and one Eckels for personal injuries sustained by her when struck by an automobile belonging to Jones and operated by Eckels. Defendant manufactured and sold granite and marble monuments. Eckels was at the time of the accident in de-

fendant's employ as a traveling salesman, selling the finished products of the business. The car was used by Eckels when necessary in covering his territory. Eckels says that he was at the time of the accident, and had been for several days prior thereto off duty on a vacation, using the car for his own benefit, and was at the time returning from a trip to Akron, Ohio, to visit his daughter, and to sell or deliver to purchasers books of poetry written by himself. Eckels admitted that the territorial extent of his employment with Jones was unlimited. W. B. Gum, Chief of Police, testified that Eckels told him at the scene of the accident and a short time thereafter that he "was traveling for the Jones Marble Works at Weston". Sanford A. Shahan testified that he attempted negotiations with defendant to settled the claim for damages on two occasions prior to the institution of suit and that defendant did not on either occasion contend that Eckels was driving the car on his own account at the time of the accident. In this case, the court held that it was for the jury to say whether at the time of the accident Eckels was acting within the scope of his employment.

We submit that the case just referred to is not in point. In that case, Eckels had a "roving commission" to use defendant's car in soliciting business for defendant. In the principal case, Holt did not have a "roving commission". It was his practice and custom to secure petitioner's permission to use cars for demonstration purposes, and when the demonstration was ended to return them to petitioner's place of business. Although the opinion in the case of *Shahan* v. *Jones* does not so state, it is quite evident that Eckels, the salesman, had the right to use the car for his own personal pleasure and convenience, and in any manner that he desired. This is not true in the principal case. It also appears in the case of *Shahan* v. *Jones* that at the time of the accident Eckels stated that he was traveling

for the Jones Marble Works at Weston and it further appears that when the father of the plaintiff was negotiating with Jones for a settlement of the claim, that Jones did not at that time contend that Eckels was driving the car on his own account. Therefore, we submit that *Shahan* v. *Jones* is not authority for the appellees in this case, and we further submit that the rule laid down in the *Shahan* v. *Jones* case has been modified by the later cases of *Meyn* v. *Dulaney-Miller Auto Company* and *Jenkins* v. *Spitler, supra.*

We understand that appellees also rely on the case of *Miller* v. *Douglas* (W. Va.), 5 S. E. (2) 799. This case is not in point. It apparently holds that a prospective purchaser driving a car for demonstration purposes and unaccompanied by the owner or a salesman, is an agent of the owner while so doing and that the owner is liable for the prospective buyer's negligence in striking and injuring a third party. Conceding that this is the holding of the court in that case, it is quite clear that the case is not in point. In the principal case, Ellison was not interested in purchasing the car, and was not trying it out or demonstrating it, either for his own benefit or for the benefit of any other person. He was merely driving a party of drunks on a joy-ride. In fact, he was not driving it with the knowledge or consent of Herbert Holt, petitioner's employee, who was entrusted with the use of the car. The case is not at all in point.

If this case does in fact hold that a prospective purchaser driving a car for demonstration purposes unaccompanied by the owner or his salesman is an agent of the owner, and that the owner is liable for the prospective purchaser's negligence, then it certainly is a revolutionary doctrine and is contrary to all the cases we have read on the subject. The correct rule is laid down in *Moseley* v. *Kimble* (Ill.), 178 N. E. 66; *Saums* v. *Parfet,* 258 N. W. 235.

In the cases of *Cochran* v. *Michaels, Shahan* v. *Jones* and *Miller* v. *Douglas, supra,* the employee or agent at the time of the accident was operating the master's car with the *express consent* of the master. In the principal case, at the time the accident occurred, Herbert Holt was operating the car in direct *disobedience* to petitioner's instructions, which were to go to Hiawatha and attempt to sell the car to Hale.

B.

The evidence is not sufficient to justify the jury in finding that at the time of the accident Ellison was operating petitioner's car with the knowledge and consent of Herbert Holt.

Practically all of the cases heretofore discussed involved accidents occurring when salesmen for automobile dealers or other employees were *themselves* operating the owner's car at the time of the accident. However, in this case, petitioner's car was not being operated by Holt, his employee, but was being operated by Frank Ellison, without the knowledge or consent of either petitioner or Holt. It is true that when the party was at the West Virginia Filling Station that Holt asked Ellison to drive. However, Ellison refused, stating that his operator's license had been revoked. Ellison then suggested that Weikel drive. Thereafter, Holt did not request Ellison to drive, and it is entirely clear that at the time of the accident Ellison was operating the car without the knowledge or consent of Holt. How does this effect the liability of petitioner?

We submit that if Holt himself had been driving that petitioner would not have been liable for the resulting damage, for the reason that Holt was not acting within the scope of his employment. For much stronger reasons petitioner should not be liable when Ellison, a total stranger, took the car over at a time when Holt was badly intoxicated; in fact.

unconscious, and without either the knowledge or consent of Holt.

The cases are in hopeless conflict on the question of the master's liability for the negligence of a third person who is operating the master's car with the permission and in the presence of the master's servant. These opposing views are very well illustrated by the holdings of the highest courts of Massachusetts and New York.

> "Where it was not within scope of truck driver's authority to permit any one to ride on or operate the truck, owner thereof was not responsible for negligence of an intruder, permitted by chauffeur to ride and drive truck, and whose negligence in driving on left of street caused collision with plaintiff's automobile."
>
> *Butler* v. *Mechanics' Iron Foundry Company*, (Mass.) 156 N. E. 720, Syl. 1.

> "Where employer sent out a motor truck with driver and salesman to deliver merchandise, and driver without authority permitted salesman, who did not possess a driver's license, to drive truck, held that, whether driver was negligent in permitting incompetent substitute to drive and in failing to supervise or control substitute in driving at speed presumptively excessive under Highway Law, Sections 287, 288, and Yonkers Code of Ordinances, Art. 4, Section 67, as amended by Gen. Ordinance No. 4 of October 15, 1916, so as to make employer liable when salesman ran truck into automobiel parked along roadway, was for jury, even if liability is tested by rule at common law."
>
> *Grant* v. *Knepper*, (N. Y.) 156 N. E. 650, Syl. 1.

Also see notes on this question, 44 A. L. R. 1382, 54 A. L. R. 851, and 98 A. L. R. 1043.

We will not attempt to discuss these cases in detail, but in all of the cases which we have examined imposing liability on the master for the negligence of a third person, permitted by the master's servant to drive his car, it ap-

pears that at the time of the accident the car or truck was being used *in the business of the master,* and in most if not all of them, that the servant *was present directing and controlling the operation* of the car or truck, or at least in a position to do so.

Assuming the correctness of the decisions imposing liability on the master, we submit that they have no application to this particular case, for the reasons (1) that this car was not being operated in the interest of or on any business for petitioner; and (2) that Herbert Holt, petitioner's employee, was not in a position to supervise and control the operation of the car; did not know of or consent to the operation of the car by Ellison. We have a case here where the employee becomes hopelessly intoxicated and passes out and a stranger takes over the car, not in furtherance of the business of the employer, but for the purpose of procuring liquor and women, and at the time of the accident the car is headed in the opposite direction from the employer's place of business.

C.

The evidence is not sufficient to justify the jury in finding that Holt was a person of inebrious habits; that petitioner knew of said habits, and that petitioner was, therefore negligent in allowing Holt to drive petitioner's car.

We quote from the majority opinion of the Circuit Court of Appeals in these cases:

> "It was the duty of Crockett in the selection of Holt as his agent to use reasonable care to ascertain his competency to drive a car and the existence of habits which would make it unsafe to place so dangerous an agency in his charge. The owner owed a duty to the public to know something about the character and habits of an employee in whose charge he placed an automobile. A rapid moving and heavy vehicle be-

comes highly dangerous when negligently operated. *It is evident from the readiness with which Holt engaged in the drunken carousal so early in the morning that he must have been a man of inebriate habits and that Crockett in whose employ he had been for a year or more before the accident either knew or was charged with the duty of knowing this fact, which is further emphasized both by the continued employment of Holt after the accident for approximately a year and up to the time of the trial (whether longer or not we are not advised), and by the further fact that Crockett refused to take the stand, thereby entitling the jury to indulge in all reasonable presumptions against him. Holt's agency was not one limited by certain specific instructions, it was an agency coupled with wide discretion, and it is especially true that if Crockett knew, as he should have known, and as the jury had every right to assume that he knew, of Holt's habits, he is certainly to be charged with a result which might reasonably have been anticipated at the hands of a drunken employee.* Under the facts of this case Holt throughout was acting within the scope, or apparent scope, of an agency charging his employer with liability.

Our newspapers are filled with daily accounts of automobile wrecks resulting in serious injuries and deaths at the hands of drunken drivers, some as owners and others as employees. *Surely the courts are not called upon to encourage or license this deadly menace because forsooth the owner of a motor vehicle may relieve himself of liability in the employment of an agent of inebriate habits of which he has failed to make inquiry;* * * *"

It is perfectly clear from the foregoing quotation that the court's judgment is not based on the doctrine of respondeat superior, but is based upon the supposed negligence of petitioner in turning his car over to an employee whom he knew or should have known was addicted to the use of intoxicating liquor. However, the court's conclusions are without any foundation in the evidence.

Except for the admitted fact that Holt became intoxicated on the day of the accident there is not a scintilla of evidence in the entire record that Holt had previously ever taken a drink of liquor or that he was an incompetent driver or an irresponsible person. Yet, the Circuit Court of Appeals holds in substance that because Holt became intoxicated on the day of the accident that he was in the habit of getting drunk and that petitioner either knew or should have known this fact, and that when petitioner turned his car over to Holt he should have anticipated that Holt would get drunk and wreck the car and injure someone. These are violent presumptions to say the least. The court in effect says that if a man gets drunk once he is a drunkard and therefore shall not be entrusted on the highway with an automobile, and if an employer knows that his employee has on one occasion been intoxicated that he dare not thereafter trust the employee with his car at the risk of being charged with all the negligent acts of said employee. It must be borne in mind that there is not a scintilla of evidence in the entire record that prior to the day of the accident Holt had at any time or under any circumstances been drunk or even taken a drink of liquor. Yet the court reasons that because Holt got drunk on the day of the accident that he is therefore a drunkard, that he is in the habit of getting drunk, that he is a dangerous and irresponsible operator of automobiles, and that one who entrusts him with an automobile does so at his peril. This is exactly what the court says in this case, and the only possible basis for such conclusion is the bare fact that Holt did become intoxicated on the day of the accident.

If the fact that a man gets intoxicated on one occasion forever stamps that individual as a drunkard and a dangerous and irresponsible operator of automobiles, then we submit that there would be few automobiles on the road. It is a matter of common knowledge that men in all walks of life do get intoxicated upon occasions; some even get in-

toxicated in the day time, and some need very little encouragement. However, to stamp each and every one of these individuals as a dangerous and irresponsible person who cannot be entrusted on the highways with an automobile seems to be carrying the matter entirely too far. Such a conclusion is contrary to all human experience, contrary to all logic and reason.

Plaintiffs placed Holt on the witness stand and during his examination he was asked whether he had ever taken a drink of liquor (R. 125). Counsel for petitioner objected to this question for the reason that it had no possible bearing on any issues involved in the case, and the court sustained the objection. The issue involved in the case was this—whether Holt was on petitioner's business at the time of the accident, and if so, whether Holt was negligent. This was the sole issue in the case. As will hereinafter be shown, plaintiffs have not proceeded on the theory that petitioner was negligent in turning his automobile over to a person known to be a drunkard and irresponsible. This would have been an entirely different cause of action. As above stated, however, attorneys for petitioner objected to the question and the court sustained the objection. Counsel for plaintiffs then stated to the court that they expected to prove to the court that Holt was an habitual drinker, and that this fact was known to petitioner, his employer. This one improper question and the statement of counsel for plaintiffs is the only suggestion in the entire record that Holt had ever at any time prior to the day of the accident taken as much as one drink of liquor. Holt did not reply to the improper question. Counsel for plaintiffs could have required Holt to answer the question for the benefit of the record. This was not done, and it does not appear what Holt's answer would have been. Thereafter, plaintiffs made no effort whatever to prove that Holt was an habitual drinker and that petitioner had knowledge of that fact. Yet

the court without any basis of fact whatever draws the conclusion that because Holt got drunk on one occasion that he was a drunkard; that he was in the habit of getting drunk; that he was irresponsible and that thenceforth his employer dare not entrust him with a car. Nothing more remains to be said on this question. The conclusions drawn by the court are violent in the extreme.

In the above quotation, the court comments on the fact that Crockett had retained Holt in his employ after the accident. What does this prove? Certainly it does not prove or tend to prove that on the day of the accident petitioner knew that Holt was a drunkard. What possible bearing could petitioner's retention of Holt in his employ have had on petitioner's knowledge of Holt's habits at the time the accident occurred? None whatever.

Failure of Petitioner to Testify.

In the above quotation, the court also says that petitioner "refused to take the stand, thereby entitling the jury to indulge in all reasonable presumptions against him." We cannot understand why the court uses the word "refused". No one requested petitioner to take the witness stand in this case, and there was no occasion whatever for his doing so. Petitioner knew absolutely nothing about the accident involved in this case, and it was wholly unnecessary for petitioner to testify as to Holt's authority in selling cars, because Holt was placed upon the witness stand by the United States of America, and McElroy, and testified fully with reference to his authority (R. 96 to 101). This testimony was later expressly adopted by Hanna (R. 144). There is no evidence in the record tending in any way to discredit or contradict the evidence of Holt on this proposition. There was no necessity for petitioner to take the witness stand and his failure to do so did not entitle the jury

to indulge in any presumptions or inferences against petitioner. The principle which plaintiffs seek to invoke has no application whatever to this case. The principle sought to be invoked correctly stated is as follows:

> "The law creates a presumption, where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, that his testimony, if introduced, would be adverse to his interests. *However, the failure of a party to offer himself as a witness does not justify any prejudicial inferences against him, unless it is shown that there were facts peculiarly within his knowledge which were not known so fully to any other witness.*"
>
> 20 Am. Jur. page 193, Section 190.

> "Where the burden is on a party to prove a material fact *peculiarly within his knowledge,* and he fails without excuse to testify, the presumption according to the weight of authority arises that his testimony, if introduced would be adverse to his contention."
>
> 10 R. C. L. 887, Sec. 36;

Also see 20 Am. Jur. pages 194-195. However, before this presumption can arise, the facts must be shown to lie peculiarly within the party's knowledge. They must be in issue and the burden must be upon the party to prove said facts. In the principal case, the facts with reference to Holt's authority did not lie peculiarly within petitioner's knowledge; Herbert Holt knew the facts as well as petitioner. Holt was placed on the witness stand by the plaintiffs and testified fully as to his authority. Therefore, the law is clear that under such circumstances the jury were not justified in drawing any unfavorable presumptions or inferences against petitioner.

> "Failure to call a witness to a particular fact or facts should not prejudice a party relying thereon if the fact

be fully covered by the uncontroverted evidence of other witnesses."

Schiffler v. *Kissel,* 103 W. Va. 545, 138 S. E. 107, Syl. 5.

"No presumption arises from failure of claimants to testify; the execution and delivery of the notes evidencing the debts being solely in the knowledge of the debtor, who testified for them, *and the consideration being equally in her knowledge,* and there being no allegation of collusion between them."

Murphy's Hotel Co. v. *Herndon's Admr.* (Va.), 91 S. E. 634, Syl. 1.

"There is no presumption against a defendant for failure to call witnesses, or any particular witness, when the plaintiff, carrying the burden of proof, has not made a prima facie case.

Such presumption cannot be used to relieve the plaintiff from the burden of proving his case."

Cooper v. *Upton,* 60 W. Va. 648, 64 S. E. 523, Syls. 4 and 5.

D.

The Circuit Court of Appeals erred in deciding these cases upon issues not raised in the pleadings, not submitted to the jury, nor considered by the District Court, and upon which issues no evidence whatever was introduced by any of the parties' hereto.

Although the Circuit Court of Appeals attempts to justify its decision on the ground of agency, it is perfectly clear that the sole basis of the decision is that Holt was a man of inebrious habits; that petitioner either knew or should have known such fact, and that, therefore, petitioner was negligent in turning his car over to Holt. Obviously this is not the cause of action declared on by plaintiff. It was not the cause of action tried in the lower court and submitted to the jury. If such facts would constitute a cause of action,

it would be a cause of action based on primary negligence of petitioner in turning his car over to a person known to be of inebrious habits. No case has come to our attention which goes so far as to hold that an employer would be negligent under such circumstances. There are many cases to the effect that when the owner of a car turns the car over to another person known to be an incompetent or a reckless driver, that the owner is liable for the negligent acts of such operator, but that is not the question here. There is not the slightest evidence in the record that Holt was an incompetent or a reckless operator of automobiles.

An examination of the three complaints filed in this case discloses clearly that the theory upon which the plaintiffs relied for recovery against petitioner was that Ellison and Holt were petitioner's *agents* at the time of the accident; that they were on *petitioner's business;* and that they were *negligent.* Petitioner's answers denied that at the time of the accident either Holt or Ellison were his agents and on his business. Therefore, the issue was clear-cut. The issue was whether at the time of the accident Holt and Ellison were on petitioner's business. This was the only issue. The complaints did not allege or intimate that at the time petitioner turned his car over to Holt, Holt was a drunkard and irresponsible, and that petitioner knew this fact and was, therefore, negligent in turning the car over to Holt. If such facts had been alleged in the complaint, this would have constituted an entirely different cause of action from the one actually declared on. There can be no question about this. A cause of action based on agency and negligence of the agent is entirely different from a cause of action for negligently turning over to a person known to be intoxicated or addicted to the use of intoxicating liquors a dangerous instrumentality such as an automobile. The two causes of action are as different as day and night. If a person turns his car over to a person known to be intoxicated, or to be in

the habit of becoming intoxicated, he might be responsible for the injuries negligently inflicted by such person on a third party, but not on the ground of agency, but because of his negligence in turning over a dangerous instrumentality to an irresponsible individual. He would be liable on account of his *primary negligence* in turning his car over to such an irresponsible individual. This particular cause of action is involved in the cases of *Department of Water Power, etc.*, v. *Anderson*, 95 F. (2d) 577, and *Tolbert* v. *Jackson*, 99 F. (2d) 513, cited in the opinion of the Circuit Court of Appeals.

It is perfectly clear that the court has decided this case not on the cause of action alleged in the complaint, namely, a cause of action involving agency and the negligence of the agent, *but* on an entirely different cause of action, namely, the negligence of Crockett in turning his car over to a person known to be a drunkard and irresponsible. The language of the opinion makes this entirely clear; see pages 194 and 195 printed record. In the majority opinion, the case of *Tolbert* v. *Jackson*, 99 F. (2d) 513, is cited and relied on. This case involved the conduct of the owner of a car who turned it over to a person known to be intoxicated. If the court intended to decide the principal case upon the question of agency, which was the cause of action alleged in the complaint, it would be entirely unnecessary and superfluous to point out and emphasize the fact that Holt was a drunkard and that petitioner knew it. This would make no difference on the issue of agency, and the fact that Holt was a drunkard would certainly not tend to prove agency where agency otherwise did not exist. Such facts as Holt's addiction to liquor, if indeed, they be facts, would only be material if recovery was sought on the ground that petitioner was negligent in turning his car over to a person known to be drunk or to be in the habit of becoming drunk.

This question has absolutely no bearing on the question of agency and if no agency existed between Holt and petitioner, the fact that Holt was a confirmed addict would not

What we have said is clearly supported by the law of West Virginia. We call the court's particular attention to the case of *Jenkins* v. *Spitler,* (W. Va.) 199 S. E. 368. In that case, plaintiff sued defendants alleging that defendants' automobile, operated by defendants' agent, had negligently inflicted injury on her. In this case a salesman employed by the defendants had borrowed defendants' car for the purpose of taking a trip. The court held that the employee was not on the business of the defendants at the time of the accident and, therefore, that the defendants were not chargeable with the negligence of the operator of the car. The court further held, *and this is important,* that there was evidence in the case to the effect that when defendants turned this car over to the salesman that the brakes were defective and that the defendants either knew or should have known this fact. The court further held that this act of negligence would have been sufficient to support the jury's verdict against the defendants *had this cause of action been pleaded,* but the court said that the defective brakes were not pleaded by the plaintiff, that this issue was not involved in the case, and, therefore, the jury's verdict could not be upheld on the theory that the defendants had turned the car in question over to their employee with the knowledge of the defective brakes. In discussing this question the court said:

> "Not only was the matter of defective brakes not pleaded but the question was not submitted to the jury under instructions. Only in an incidental way did the evidence about them get into this record, and then it came in by the voluntary statement of one witness."

We call the court's particular attention to this case. What the court says in the case of *Jenkins* v. *Spitler* is equally

applicable to this case. In that case the question of the defective brakes was not pleaded and the matter was not submitted to the jury in the instructions. The same is true in this case. The negligence of petitioner in turning his car over to a person known to be in the habit of getting drunk was not pleaded and this issue was not submitted to the jury in a single instruction offered. To the contrary, the jury were repeatedly told that before they could find against petitioner that they must find that at the time of the accident Holt was acting on petitioner's business. This was the issue and the only issue tried in this case. If plaintiffs had proceeded on the theory of petitioner's negligence in turning his car over to a person known to be in the habit of becoming intoxicated, then petitioner would have had an opportunity to introduce testimony to the contrary. However, petitioner has not had such an opportunity, because the pleadings filed in the case did not proceed upon any such theory; there was no such issue involved, no evidence whatever was introduced upon such issue, and under the pleadings it would have been improper to introduce such evidence.

We respectfully submit that petitioner has had no opportunity to meet the issue upon which this case was decided. He should be given this opportunity under proper pleadings, advising him specifically what act of negligence plaintiffs rely on.

For the foregoing reasons, petitioner respectfully submits that the writs of certiorari prayed for be granted, and that the judgments complained of be reviewed and reversed.

Respectfully submitted,

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